

Are the Special and Differential Treatment Provisions in the WTO Agreements Fit for Purpose?*

There exists in international trade relations a gulf that separates the rich from the poor, the developed, richer countries from the poorer developing countries. A more recent development indicates a third category of least developed countries (LDC), which as the name of the category suggests, the poorest amongst the poor.

There have been many reasons given for this disparity, mostly resting on the historical perspective of colonialism.¹ Whatever the cause, it must be appreciated that the disparity is getting worse rather than better.² There has been an increasing appreciation that this disparity should be closed, based on the welfare underpinnings of the Classical Trade theories, the theories of Absolute³ and

Comparative Advantages⁴ relating to production and social notions of justice and equality.⁵ The development of the perspective that participation in international trade and growth are symbiotic and as a result, the encouragement and inclusion of developing and LDCs is crucial to closing the developmental gap is best appreciated in the second paragraph of the Preamble to the Agreement Establishing the World Trade Organisation.⁶

The welfare emphasis of international trade relations was used rather selectively immediately prior to the Second World War⁷. However, with the onset of decolonization,

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¹M. Martin, *WTO Dispute Settlement Understanding and Development*, Nijhoff International Trade Law Series, Martinus Nijhoff Publishers, 2013, p. 66

²E. Kessie, "The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements", in G. Bermann and P. Mavroidis (eds), *WTO Law and developing Countries, Columbia Studies in WTO Law and Policy*, Cambridge University Press, 2007, p. 12

³A. Smith, *The Wealth of Nations*, New York: Modern Library, 1994 [1776], p. 114, N. Grimwade, *International Trade; New Patterns of Trade, Production and Investment*, 2nd Edition, Routledge, 2000, p. 30, J. S Mill, *Principles of Political Economy* [1884]. Ed. W.J Ashley London, 1909, p. 681, D. Irwin, *Against the Tide : an intellectual history of free trade*, Princeton University Press, 1996, p. 14

⁴D. Ricardo, *On the Principles of Political Economy, and Taxation*, Harmondsworth: Penguin, 1971 (Originally published 1817), p. 7

⁵Parekh, B. in an address entitled "The Challenge of Globalisation" at the launch of The Centre for the Study of Contemporary Change and Development, The University of Hull, 10 February 2005, see also U. Beck. "What is Globalisation" Polity, 2000, p. 20-21

⁶http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm. See also discussion in M. Martin, *WTO Dispute Settlement Understanding and Development*, Nijhoff International Trade Law Series, Martinus Nijhoff Publishers, 2013, p. 66 and E. Kessie, "The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements", in G. Bermann and P. Mavroidis (eds), *WTO Law and developing Countries, Columbia Studies in WTO Law and Policy*, Cambridge University Press, 2007, p. 12

⁷M. Martin and M. Shadman Pajouh, "Globalisation and Trade: The Means to What End?", *International Journal of Business and Management Study*, Vol. 1 Iss. 3, 2014, pp. 19-13, p. 21. See also Y.S. Lee, *Reclaiming Development in the World Trading System*, Cambridge University Press, 2006, p. 14-15

and the resulting birth of many new nations all of which were developing countries, the international system needed an approach that would not only accommodate but entice these countries to participate in and integrate themselves into the international trading system⁸. This integration is important for their economic growth, as some authors point out the slower rate of economic development in India between the mid-1960s and the 1980s in comparison with surrounding countries was in part due to the neglect of foreign trade.⁹

Previous international trade agreements, the way they worked and the interests they focused on, did not provide sufficiently for such integration. Therefore in recent times the method of achieving this integration was to create a stronger rule based system multilateral trading system, one that would be inclusive and counter the imbalance in wealth and capacity to participate in such a system. The WTO was established, and part of this inclusive approach was to provide for a mechanism that would offset the imbalance in the membership. This was to be achieved through the inclusion of special and differential treatment (S&D) provisions into the multilateral trading system.

S&D treatment provisions are meant to support developing and least developed

member participation and integration into the international trading system by providing special, more relaxed or flexible rules for them. The need for such rules is due to the inherent disadvantage such countries are in compared to richer, more advanced developed countries. The disadvantage must be understood against the back drop that much, if not all of the initial multilateral trading legal framework was negotiated between a few, powerful countries and as a result such framework pursued their interests. Therefore, S&D was meant to “*level the field of play*”, by establishing rules that provide a fair balance between costs and benefits of new agreements, interests of both developed and developing countries and strengthening the rule based system would ensure the legitimacy and sustainability of these rules. By building a transparent and inclusive system, this would contribute to the capacity of developing countries to participate effectively in the decision making process which in turn reinforces the entire system.¹⁰ S&D in this context is to ensure proportionality of trade agreements commensurate with levels of development and capacity to manage burdens of the adjustment process of membership. S&D alone will not promote the development objectives of trade. It will only be a part of a broader approach that recognises that the fundamental interests of developing countries in the trading system is to seek fair trade, capacity building, balanced rules and good

⁸B. Rajagopal, *International Law from Below: Development, Social movements and Third World Resistance*, Cambridge University Press, 2004

⁹AA.K. Bagchi “Globalisation a Sketch” available at [http://www.cpdindia.org/globalhumansecurity/globalisation.htm] on 14/10/2005 at 7.00 pm

¹⁰F. Ismail, “Mainstreaming Development in the World Trade Organisation”, *Journal of World Trade* 39 (1) 11-12, 2005

governance, with an outcome that would be of benefit to all through a strengthened multilateral rule based system.¹¹

Some authors state that S&D has no economic underpinning and that as a political issue; it has caused developing countries to be classed as second class members in the WTO.¹² They submit that S&D would inhibit economic development and poverty alleviation and the full participation of developing countries in the international trading system.¹³ The WTO according to them is about removing barriers to international trade, and this is done through agreed rules and negotiations.¹⁴ However it must be appreciated that in an organisation such as the WTO, one size does not fit all. One must ask the question of what is the objective of the removal of barriers to trade? Is it merely the removal of barriers for the sake of removal or is there an underlying objective. If we use the objectives of the classical trade theory of international trade which was the underlying principles of the regulation of international trade in the early 1940s to support the objectives of welfare and development enhancement, then, development as an objective for the GATT and subsequently WTO cannot be denied (book). This, as highlighted earlier in this paper is evident from the second paragraph of the Preamble to the

Agreement Establishing the World Trade Organisation.¹⁵

The debate in the WTO regarding development and the ability of developing countries to participate and integrate themselves on the one hand and the lack of an effective mechanism to ensure that this can happen on the other, focusses not exclusively but significantly on S&D provisions,¹⁶ specifically on their inability to contribute to achieving the objective of developing country integration into the system.¹⁷

With this dissatisfaction, comes the unwillingness of developing countries, remembering that they form two thirds of the WTO membership¹⁸ to support any widening of the regulatory coverage of the WTO.¹⁹ The inclusion of labour standards, competition rules, environmental concerns and even government procurement may well become increasingly desirable as the global economy develops. However, without sufficient support, these issues may never come under the

¹¹Ibid

¹² M. Hart and B. Dymond, "Special and Differential Treatment and the Doha "Development" Round". *Journal of World Trade* 37 (2) 395-415, 2003, p. 395

¹³ibid

¹⁴Ibid, p. 396

¹⁵WTO, Supra note 6

¹⁶ S. de Cordoba, S. Laird and D. Vanzetti, "Blend It Like Becham-Trying to Read the Ball in the World Trade Organisation Negotiations on Industrial Tariffs", *Journal of World Trade* 38 (5) 773-794, 2004, p. 775

¹⁷ "Loaded against the poor: World Trade Organisation" Policy Department of Oxfam (Great Britain), November 1999, available at [<https://www.jiscmail.ac.uk/cgi-bin/filearea.cgi?LMGT1=DPU-PIP&a=get&f=/wto-oxfamgb.txt>] accessed on 28/10/2014 at 12.36 pm

¹⁸ [http://www.wto.org/english/thewto_e/whatis_e/tif_e/dev1_e.htm] accessed on 28/10/2014 at 2 pm

¹⁹ M. Martin, supra note 1, p. 63

auspices of the WTO due to the issue of insufficient development facilitating provisions within the WTO agreements.

The issue at hand for this paper is whether the S&D provisions in the WTO are meeting their objectives of supporting and promoting the participation and integration of developing countries and LDC into the multilateral trading system.

Previous research has indicated that there are a total of 167 provisions and related instruments on S&D throughout the WTO Agreements.²⁰ According to the analysis of all the S&D provisions and related instruments, 78 of the 167 provisions (47% of total S&D provisions) have either expired, partially expired or become outdated or obsolete. Of the 78 provisions, 39 (23% of total S&D provisions) have expired and can no longer be referred to as capable of providing S&D treatment for developing countries. A further 35 provisions (21% of total S&D provisions) have partially expired and 4 provisions representing 2 % of total S&D provisions are either outdated or lapsed as their utility have become obsolete.

Of the remaining 89 provisions (53% of total S&D provisions), 71 provisions (42% of total S&D provisions) are for various reasons arising out of generalities, ambiguities, blatant non-application, counter productivity or contingency upon negotiated outcomes incapable of creating enforceable rights or

bringing about binding obligations. As such, they are not fit for purpose as they are unable to provide for effective S&D treatment.

The remaining 18 provisions (11% of total S&D provisions) have the capacity, albeit mitigated in many circumstances to provide for a degree of S&D treatment. These provisions are mitigated in their overall effectiveness due to limited applications as they apply to LDCs or NFI developing countries only, are temporary in their application, relate to compliance and not market access, have conditions attached to the S&D, weakly worded provisions, relate to technical assistance only or having unclear definitions or criteria. Therefore, by way of utility, only 11% of S&D treatment provisions and related instruments are capable of providing an avenue to counter the imbalance between developed and developing country members in the WTO. However, the effectiveness of these provisions in achieving this objective is severely mitigated due to the limited application and inherent weakness of the provisions.

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²⁰ See M. Martin, supra note 1, Appendix 1, pp 309 - 375 for the entire analysis

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